

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STUART GREGORY RAVN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12174  
Trial Court No. 3AN-12-10379 CR

MEMORANDUM OPINION

No. 6593 — February 28, 2018

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Jack W. Smith, Judge.

Appearances: Robert C. Erwin, Robert C. Erwin, LLC,  
Anchorage, for the Appellant. Diane L. Wendlandt, Assistant  
Attorney General, Office of Criminal Appeals, Anchorage, and  
Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,  
Superior Court Judge.\*

Judge SUDDOCK.

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\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Stuart Gregory Ravn was charged with twenty-three counts of possession and distribution of child pornography.<sup>1</sup> Before trial, Ravn moved to suppress all of the evidence in the case, arguing that his mental health counselor violated his psychotherapist-patient privilege when she reported his use of child pornography to the authorities. The judge ruled that while the mental health counselor may have violated Ravn’s expectation of confidentiality, her private decision to do so was not the result of state action; accordingly, the exclusionary rule did not apply to the evidence obtained as a result of her disclosure. We affirm the judge’s ruling.

*Testimony at the evidentiary hearing on Ravn’s motions to suppress*

We present the evidence adduced at the evidentiary hearing in the light most favorable to the trial judge’s findings of fact.<sup>2</sup>

In September of 2012, Kristina Erhart — a physician’s assistant specializing in psychiatry at an Anchorage medical and counseling clinic — called the police. Erhart reported that a patient, whose name she did not disclose, had revealed that he had downloaded child pornography. Erhart was concerned about whether Alaska’s mandatory reporting laws required her to reveal the patient’s name.<sup>3</sup>

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<sup>1</sup> AS 11.61.125(a) and AS 11.61.127(a), respectively.

<sup>2</sup> See *Barber v. State*, 386 P.3d 1254, 1259 (Alaska App. 2016) (explaining that “[w]hen we review a lower court’s finding under the ‘clearly erroneous’ standard, we must view the evidence in the light most favorable to the lower court’s finding.” (citations omitted)).

<sup>3</sup> See AS 47.17.02 (requiring certain persons to “immediately” report to the Office of Children’s Services if they “have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect”); see also AS 47.17.290(d) (defining “child abuse or neglect” as “physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child”).

Anchorage Detective Mark Thomas learned of Erhart's inquiry. Thomas contacted Assistant District Attorney Clint Campion. Campion did not believe that Erhart was required to report, but he asked Thomas to "get more information."

On September 28, 2012, Detective Thomas contacted Erhart. Erhart said that one of her patients — "an incredible young man" — was suffering from mental health issues and was contemplating suicide. The patient confessed to downloading thousands of images of child pornography over the last decade. He also admitted to fantasizing about children in his life, including his music students, but he stated that he had not acted on those fantasies. Erhart stated that she believed him.

Erhart explained to Detective Thomas that she wanted to protect herself if the law required her to report this. But she also expressed concern about the criminal justice system's approach to pedophiles. Thomas responded that, while he did not want Erhart to violate patient confidentiality, he nonetheless would seek to obtain the patient's identity "properly and legally." Thomas stated that he needed to speak further with the district attorney's office, but he told Erhart that, thus far, the district attorney's office "doesn't think you're a mandatory reporter because there's nothing in the law [requiring a report] for child pornography[.]"

Detective Thomas later spoke with another assistant district attorney, Marika Athens, on October 1 and 2, 2012. Like Campion, Athens did not believe that Erhart was required to report. Thomas and Athens discussed how to legally obtain information about the patient while honoring Erhart's obligation of confidentiality.

Then, on October 3, Thomas contacted Erhart's clinic and told the receptionist that he had "some paperwork he need[ed] to give [Erhart]." Thomas drove to the clinic with another detective, intending to serve Erhart with a subpoena requiring disclosure of her patient's name.

But as Thomas entered the clinic, Athens called him and directed him not to serve the subpoena. Athens explained that she would try to obtain the information “a different way.”

Erhart was busy when the detectives arrived, so the detectives spoke with Erhart’s supervisor, Dr. Eric Garby. Detective Thomas explained that they had come to the clinic to “establish a relationship.” According to Garby’s later testimony, the detectives were “very professional” and “non-menacing,” and they did not discuss the mandatory reporting question.

Later in the day, Dr. Garby learned of the unserved subpoena. Dr. Garby assumed that the purpose of the subpoena was to compel disclosure of Ravn’s identity and, potentially, to provide the police with Erhart’s treatment information. The subpoena and the police visit added to Dr. Garby’s concern that the mandatory reporting law might require the clinic to divulge Ravn’s identity to the authorities.

After the officers’ visit, Dr. Garby contacted Barbara Fleshman, a risk manager employed by the clinic’s malpractice insurer. Dr. Garby asked Fleshman to research whether Erhart was required to report Ravn’s identity. Fleshman opined that the clinic “ought” to report, but she told Garby that she did not know if reporting was mandatory.

Later that afternoon, Fleshman and Erhart spoke by phone. Fleshman told Erhart that, even though the clinic’s obligation was unclear, it was “better to err on the side of caution” — which Erhart understood to mean that she should disclose Ravn’s identity to the police. After this conversation ended, Fleshman contacted either a detective or Athens, and she announced that Erhart would report the patient’s identity to the authorities.

The evidence is conflicting as to what happened next.

Erhart testified that she spoke with Detective Thomas later on October 3. She claimed that Thomas told her that she was in fact required to report her patient's identity, and that she must file a report by 1 p.m. the next day. According to Erhart, Fleshman also told her to report this information. Erhart believed that she could lose her license for not reporting.

In contrast, Detective Thomas felt "very confident" that the conversation described by Erhart never occurred. Thomas testified that he opened a voicemail from Erhart when he arrived at work on the morning of October 4. In this voicemail, Erhart stated she was surprised that Thomas had come to the clinic with a subpoena. Erhart also stated that she would report her patient's identity to the Office of Children's Services (OCS) that day. Detective Thomas denied ever telling Erhart, or anyone at the clinic, that she was required to report.

Fleshman called the clinic on the morning of October 4 "to confirm that the report was being made." She told Erhart that "this must be reported" and that "you do definitely need to report or they're going to subpoena." Later that day, Erhart contacted OCS and disclosed Ravn's name.

After obtaining Ravn's identity from OCS, Detective Thomas applied for a search warrant for Ravn's home. He called Erhart and spoke with her for several minutes. Erhart mentioned that she knew about the earlier incident involving the unserved subpoena because another officer had told her about it. Detective Thomas explained that the subpoena had not been served so that the clinic could instead resolve the issue with its attorneys. Erhart told the detective that she wanted to discuss the situation with Ravn, to let him know that she concluded that she was required to report. Thomas asked her to defer this conversation so that the police could ensure Ravn's safety during the search process, and she agreed.

That afternoon, Thomas served the search warrant and searched Ravn's home. Officers seized a variety of digital media. During the search, Ravn admitted that he downloaded child pornography.

After Ravn's arrest, Erhart went to the police station and spoke with Detective Thomas and another officer. Erhart was angry that she had not been permitted to be present at Ravn's arrest. Erhart told the police that she would not document or report a similar situation in the future, and she stated that she felt guilty about reporting Ravn.

Approximately three weeks later, on October 26, Erhart contacted Thomas again. Erhart acknowledged that the police had consistently informed her that she was not required to report the information about Ravn.

#### *Ravn's motions and the trial court's rulings*

Ravn filed two motions to suppress the evidence seized pursuant to the search warrant, and a motion to dismiss. In these motions, Ravn argued that his disclosures to Erhart were privileged communications between a patient and a psychotherapist under Alaska Evidence Rule 504, and that these communications could not be used to support the application for a search warrant to search Ravn's house. Ravn alleged that the police had coerced clinic employees to reveal his confidential information. Ravn further argued that Erhart and Fleshman were acting as state agents when they elected to disclose this information to the authorities; accordingly, the subsequent search was unlawful and the resulting evidence subject to the exclusionary rule.<sup>4</sup>

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<sup>4</sup> See U.S. Const. amend. XIV; Alaska Const. art. I, § 14.

Following an evidentiary hearing, Superior Court Judge Jack Smith denied Ravn's motions. The judge found that Erhart's anger and frustration over the situation colored her memory, and that Erhart's testimony that Detective Thomas ordered her to disclose Ravn's information was not credible. Instead, the judge credited Detective Thomas's testimony that he never told Erhart that she was required to report this information.

Judge Smith found that the disclosure of Ravn's name was not the result of state action, because Erhart voluntarily reported Ravn to OCS. The police never directed Erhart to disclose Ravn's identity and never served a subpoena on the health clinic. The judge found that the police did not coerce Erhart or clinic staff to disclose Ravn's identity. On the contrary, the police repeatedly told Erhart that two different assistant district attorneys believed that the law did not require her to report Ravn's identity. The judge concluded that Erhart voluntarily disclosed the information — and that, because this disclosure was not the result of state action, the ensuing search was lawful.

Following a bench trial, Judge Smith found Ravn guilty of most of the charges.

### *Why we uphold the trial court's decision*

Because the exclusionary rule serves as a deterrent to unlawful government activity, the exclusionary rule does not apply unless there is state involvement in obtaining the evidence.<sup>5</sup>

In this case, the judge found that Erhart was not acting as a state agent when she disclosed Ravn's identity to OCS. Testimony at the suppression hearing suggested that Fleshman (the risk manager for the clinic's malpractice insurer) pressured Erhart to

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<sup>5</sup> See *Snyder v. State*, 585 P.2d 229, 231-32 (Alaska 1978) (explaining that, without state action, protections against unreasonable search and seizure do not apply).

disclose Ravn's identity. But the judge rejected Ravn's argument that the evidence supported a conclusion that the police also pressured Erhart. Instead, the judge found that Erhart disclosed Ravn's identity without police solicitation or coercion.

We review a judge's findings of fact at a suppression hearing under a clearly erroneous standard.<sup>6</sup> We must accept the facts as found by the judge unless, based on the record, we are left "with a definite and firm conviction that a mistake has been made."<sup>7</sup> And we accord deference to the trial court's determinations of the credibility of the witnesses.<sup>8</sup> Here, the judge heard conflicting testimony from Erhart and Detective Thomas regarding what the detective told Erhart about her legal obligation. The judge weighed the credibility of each witness and credited Thomas's testimony over Erhart's. Because the evidence in the record supports this finding, it is not clearly erroneous.

The judge also found that Erhart was not acting as a state agent when she disclosed Ravn's identity to the authorities, and that the police did not solicit this disclosure; in fact, the police repeatedly told Erhart that she was not required to report Ravn's possession of pornography under the mandatory reporting statute. Because the police did not engage Erhart as their agent, and committed no misconduct, the exclusionary rule does not apply.<sup>9</sup> Erhart may have violated professional or ethical rules

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<sup>6</sup> See, e.g., *State v. Campbell*, 198 P.3d 1170, 1173 (Alaska App. 2008).

<sup>7</sup> *Meyer v. State*, 368 P.3d 613, 620 (Alaska App. 2016).

<sup>8</sup> See *Wasserman v. Bartholomew*, 38 P.3d 1162, 1167 (Alaska 2002) (noting that under a clearly erroneous standard, an appellate court "consistently grants deference to trial courts where credibility is at issue." (citations omitted)).

<sup>9</sup> See *United States v. Sindona*, 636 F.2d 792, 804-05 (2d. Cir. 1980) (noting that evidence seized by private parties and then turned over to the police is not subject to the exclusionary rule, for lack of police misconduct); see also *State v. Sandini*, 395 So.2d 1179, (continued...)



against disclosure of confidential patient information, but any such lapse on her part was not an outgrowth of state action.

*Conclusion*

We AFFIRM the judgment of the superior court.

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<sup>9</sup> (...continued)

1181 (Fla. App. 1981) (holding that a search warrant application based on information disclosed by an attorney in violation of the attorney-client privilege was not subject to the exclusionary rule because the disclosure was not a result of police misconduct).